Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–23–72 OF 2003
ABDUL MALIK ISHAK J
15 JULY 2005

Civil Procedure — Injunction — Application for — Action of libel and malicious falsehood — Defence of justification and qualified privilege — Failure of plaintiff to deliver a reply to defence, pleading malice to negate defence of qualified privilege — Whether injunction should be granted

Civil Procedure — Judge — Application to recuse judge — Real danger of bias test — Adverse finding of fact against plaintiff in earlier proceedings — Whether would give rise to real danger of bias by judge in forthcoming proceedings

Civil Procedure — Language — Affidavit in English only, and not in national language — Whether in breach of O 32 r 13(2)(a) of the Rules of the High Court 1980 — Whether breach fatal to application

The plaintiff applied: (1) in encl 59 for the judge to discharge himself from hearing and determining all further proceedings in this action including the trial thereof; and (2) in encl 4 for an interlocutory injunction against the defendants. The plaintiff advanced two grounds: (1) that the judge had in the first judgment (see [2005] 5 MLJ 489) ('Judgment No 1') made specific findings of fact and of the character of the plaintiff which amounted to a pre-judgment of the issues raised in the action and therefore there was an appearance of bias by the judge; and (2) that the judge had in dismissing the plaintiff's application in encl 36 for committal in Judgment No 1 justified the defendants' actions on the ground of their rights to freedom of speech and expression and that, by doing so, he must have first made a finding of guilt for the breach of the order of the court by the defendants and this amounted, according to the plaintiff, to an appearance of bias by reason of pre-judgment.

Held, dismissing both applications:

(1) The plaintiff had not filed an affidavit in support in Bahasa Malaysia. The affidavit in support as reflected in encl 60 was only filed in the English language. The failure to file an affidavit in support in Bahasa Malaysia constituted an infraction of O 32 r 13(2)(a) of the Rules of the High Court 1980 ('the RHC') (see para 10). Bereft of an affidavit in support in the Bahasa Malaysia version, the plaintiff's application in encl 59 stood alone and it must be dismissed (see para 11).

(2) The correct test for recusal of a judge is the 'real danger of bias' test (seepara 28); *Regina v Gough* [1993] AC 646 followed. The 'real danger of bias' test is a more stringent test and that a mere suspicion, however

reasonable, is not enough (see para 36). The adverse finding of fact against the plaintiff in this case would not, without more, amount to bias (see para 38). Likewise here, the fact that the judge had dismissed encl 36 with costs as reflected in Judgment No 1 must not be construed to mean that he would not decide the case on the evidence adduced before him at the trial of the main suit. An adverse finding of fact by a judge against a party in the earlier proceeding does not give rise to the real danger of bias on the part of the judge in the forthcoming proceeding (see para 40).

(3) In Judgment No 1, the findings that were made were, in fact, made based on the available evidence and nothing else (see para 44). The allegation of pre-judgment cannot, in law, amount to a real danger of bias. By filing encl 59 the plaintiff was, in fact, obliquely eroding public confidence in the judiciary (see para 45).

(4) The plaintiff did not file a reply to the defence. Such failure impacted on the plaintiff's application for an interim injunction resting on its cause of action of libel and malicious falsehood as reflected in encl 4. The defendants' had pleaded justification and qualified privilege in answer to the claim for libel and malicious falsehood. In a situation where the defendants' plead qualified privilege, the law dictates that the plaintiff must deliver a reply to the defence pleading malice to negate the defence of qualified privilege (see para 55). There was no reply to the defence and the plaintiff could not plead malice by way of an affidavit. Therefore, the plaintiff had not complied with O 78 r 3(3) of the RHC (see para 56).

[**Bahasa Malaysia summary**

Plaintif telah memohon: (1) dalam lampiran 59 agar hakim menarik dirinya daripada perbicaraan dan menghentikan semua prosiding seterusnya dalam tindakan ini termasuklah perbicaraan ini; dan (2) dalam lampiran 4 untuk satu injunksi interlokutori terhadap defendan-defendan. Plaintif telah mengemukakan dua alasan: (1) bahawa hakim tersebut telah dalam penghakiman pertama (lihat [2005] 5 MLJ 489) ('Penghakiman No 1') membuat penemuan spesifik tentang fakta dan sifat plaintif yang membentuk satu pra penghakiman tentang isu-isu yang ditimbulkan dalam tindakan dan oleh itu kelihatan seperti terdapat berat sebelah oleh hakim; dan (2) bahawa hakim tersebut telah semasa menolak permohonan plaintif dalam lampiran 36 untuk komital dalam Penghakiman No 1 menjustifikasikan tindakan defendan-defendan atas alasan hak mereka untuk bebas bersuara dan ekspresi dan dengan berbuat demikian, beliau hendaklah terlebih dahulu membuat satu penemuan bersalah kerana perlanggaran perintah mahkamah oleh defendan-defendan dan ini membentuk, menurut plaintif, anggapan terdapatnya berat sebelah dengan alasan pra penghakiman.

Diputuskan, menolak kedua-dua permohonan:

(1) Plaintif tidak memfailkan satu afidavit sokongan dalam Bahasa Malaysia. Afidavit sokongan seperti yang digambarkan dalam lampiran 60 hanya difailkan dalam Bahasa Inggeris. Kegagalan untuk memfailkan satu afidavit sokongan dalam Bahasa Malaysia membentuk satu pelanggaran A 32 k13(2)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') (lihat perenggan 10). Tanpa afidavit sokongan dalam versi Bahasa Malaysia, permohonan plaintif dalam lampiran 59 berdiri sendiri dan ia harus ditolak (lihat perenggan 11).

(2) Ujian sesuai untuk pengguguran seorang hakim adalah ujian 'real danger of bias' (lihat perenggan 28); *Regina v Gough* [1993] AC 646 diikut. Ujian 'real danger of bias' adalah ujian ketat dan andaian syak wasangka, meskipun munasabah, tidak mencukupi (lihat perenggan 36). Penemuan fakta yang bertentangan terhadap plaintif dalam kes ini tidak akan, membentuk kepada berat sebelah (lihat perenggan 38). Seperti juga disini, hakikat yang hakim telah menolak lampiran 36 dengan kos seperti digambarkan dalam Penghakiman No 1 tidak boleh ditafsirkan untuk bermaksud yang beliau tidak akan memutuskan kes berdasarkan keterangan yang dikemukakan di hadapan beliau semasa perbicaraan guaman utama. Penemuan fakta yang bertentangan oleh hakim terhadap satu pihak dalam prosiding sebelumnya tidak menimbulkan bahaya berat sebelah sebenar di pihak hakim dalam prosiding seterusnya (lihat perenggan 40).

(3) Dalam Penghakiman No 1, penemuan yang dibuat adalah, sebenarnya, dibuat berdasarkan keterangan yang sedia ada dan tidak lebih daripada itu (lihat perenggan 44). Pengataan tentang pra penghakiman tidak boleh, dari segi undang-undang, membentuk bahaya berat sebelah sebenar. Dengan memfailkan lampiran 59 plaintif telah, pada hakikatnya, secara tidak langsung mengurangkan keyakinan masyarakat awam terhadap badan kehakiman (lihat perenggan 45).

(4) Plaintif tidak memfailkan jawapan pembelaan. Kegagalan sedemikian memberi kesan terhadap permohonan plaintif untuk satu injunksi sementara berdasarkan kausa tindakan untuk libel an pemalsuan berniat jahatnya seperti yang digambarkan dalam lampiran 4. Defendan-defendan telah memplikan justifikasi dan perlindungan bersyarat dalam menjawab tuntutan untuk libel dan pemalsuan berniat jahat tersebut. Dalam situasi di mana defendan-defendan memplikan perlindungan bersyarat, undang-undnag menyatakan bahawa plaintif hendaklah memberi jawapan kepada pembelaan dengan memplikan wujud niat jahat untuk menyangkal pembelaan perlindungan bersyarat (lihat perenggan 55). Tiada jawapan kepada pembelaan tersebut dan plaintif tidak boleh memplikan niat jahat melalui afidavit. Oleh itu, plaintif tidak mematuhi A 78 k 3(3) KMT (lihat perenggan 56).]

Notes

For a case on application to recuse judge, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 3362.
For a case on language generally, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 771.
For cases on application for injunction, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2550–2562.

Cases referred to

Allied Capital Sdn Bhd v Mohamed Latiff Shah Mohd & another application [2001] 2 MLJ 305 (refd)
Alor Janggus Soon Seng Trading Sdn & Ors v Sey Hoe Sdn Bhd & Ors [2002] 4 MLJ 327 (refd)
American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504 (refd)
Animal Liberation (Vic) Inc & Anor v Gasser & Anor [1991] 1 VR 51 (refd)
Bestobell Paints Limited v Bigg (1975) FSR 421 (refd)
Bonnard v Perryman (1891) 2 Ch D 269 (refd)
Bookbinder v Tebbit [1989] 1 WLR 640 (refd)
Bumicrystal Technology (M) Sdn Bhd v Rowstead Systems Sdn Bhd [2004] 6 MLJ 169 (refd)
Charleston v News Group Newspapers Ltd [1995] 2 AC 65 (refd)
Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [2001] 1 MLJ 305 (refd)
Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [1999] 4 MLJ 58 (refd)
Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [2001] 2 MLJ 65 (refd)
Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors [2005] 5 MLJ 489
Dato' Wan Hashim bin Hj Wan Daud v Mazlan bin Ibrahim & Anor [1998] 5 MLJ 176 (refd)
Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tzu & Ors [1977] 1 MLJ 56 (refd)
Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action [1998] 3 SLR 337 (refd)
Gordon v Amalgamated Television Services [1980] 2 NSWLR 410 (refd)
Gulf Oil (Great Britain) Ltd v Page & Ors [1987] 1 Ch 327 (refd)
Hai Yue Hin v Public Feedmill (M) Sdn Bhd [1997] 3 MLJ 730 (refd)
Halim bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors [2001] 6 MLJ 353 (refd)
Harakas & Ors v Baltic Mercantile And Shipping Exchange Ltd and Anor [1982] 1 WLR 958 (refd)
Hay v The Queen (1994) 68 ALJR 582 (refd)
Herbage v Pressdram Ltd & Ors [1984] 1 WLR 1160 (refd)
Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 (refd)
Holley & Ors v Smyth [1998] QB 726 (refd)
Hubbard & Ors v Pitt & Ors [1976] 1 QB 142 (refd)
Insas Bhd & Anor v Raphael Pura [1999] 4 MLJ 650 (refd)

A *JRL; ex p CJL, Re* (1986) 161 CLR 342 (refd)
Justice Margaret Lusink of the Family Court of Australia, In the matter of an application for a writ of prohibition against & Jillian Joy Shaw ex p Brian William Shaw (1981) 55 ALJR 12 (refd)
Kaye v Robertson & Anor [1991] FSR 62 (refd)
B *Khashoggi v IPC Magazines Ltd & Anor* [1986] 1 WLR 1412 (refd)
Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd [1990] 1 MLJ 304 (refd)
Lange v Atkinson [1998] 3 NZLR 424 (refd)
Lange v Australian Broadcasting Corp (1997) 189 CLR 520 (refd)
Locabail (UK) Ltd v Bayfield Properties Ltd & Anor [2000] 1 All ER 65 (refd)
C *Lonrho plc & Ors v Fayed & Ors (No 5)* [1994] 1 All ER 188 (refd)
Lucas-Box v News Group Newspapers Ltd (1983 L No 333) (refd)
Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan [2005] 1 MLJ 15 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1 (refd)
Metropolitan Properties Co (FGC) Ltd v Lannon & Ors [1968] 3 All ER 304 (refd)
D *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 (refd)
New Straits Times Press (M) Bhd, The v Airasia Bhd [1987] 1 MLJ 36 (refd)
New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd [1989] 1 NZLR 4 (refd)
Polly Peck (Holdings) PLC & Ors v Trelford & Ors [1986] 1 QB 1000
E *Quartz Hill Consolidated Gold Mining Company v Beall* (1882) 20 Ch D 501 (refd)
Queen, The v Watson; ex p Armstrong (1976) 136 CLR 248 (refd)
Queen, The v The Commonwealth Conciliation And Arbitration Commission And Others; ex p The Angliss Group (1969) 122 CLR 546 (refd)
R v Bow Street Metropolitan Stipendiary Magistrate and others, ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577 (refd)
F *R v Brereton* (1725) 8 Mod 329 (refd)
R v Bristol Betting and Gaming Licensing Committee, ex p O'Callaghan [2000] 1 All ER 65 (refd)
R v Camborne Justices & Anor, ex p Pearce [1955] 1 QB 41 (refd)
R v Gough [1993] 2 All ER 724, [1993] AC 646 (folld)
G *R v London Rent Assessment Panel Committee, ex p Metropolitan Properties Co (FGC) Ltd* [1969] 1 QB 577 (refd)
R v Papadopoulos (No 2) [1979] 1 NZLR 629 (refd)
Rajagopal v Rajan [1972] 1 MLJ 45 (refd)
Raphael Pura v Insas Bhd & Anor [2001] 1 MLJ 113 (refd)
Regina v Gough [1993] AC 646 (refd)
H *Reynolds v Times Newspapers Ltd & Ors* [1998] 3 WLR 862 (refd)
Ron Hodgson v Belvedere Motors (1971) NS WLR 472 (refd)
Ron West Motors Ltd v Broadcasting Corp of New Zealand (No 2) [1989] 3 NZLR 520 (refd)
Rubenstein v Truth and Sportsman Ltd [1960] VR 479 (refd)
Same v Associated Newspapers Group Plc & Ors (1983 L No 336) [1986] 1 WLR 147
I (refd)
Singh (Dinesh Kumar) & Ors v Lazar & Anor [1991] Ch 391 (refd)
Sydenham v Man (1617) Cro Jac 407 (refd)

Tai Choi Yu v The Tribunal of The Special Commissioners Of Income Tax & Anor [2004] 7 CLJ 127 (refd)
Vakauta v Kelly (1989) 167 CLR 568 (refd)
William Coulson & Sons v James Coulson & Co (1886-87) 3 TLR 846 (refd)

Legislation referred to

Printing Presses and Publications Act 1984 s 4
Rules of the High Court 1980 O 32 r 13(2)(a), O 34 r 2(1), O 59 r 4(1), O 78 r 3(3), O 92 r 1

Jeffrey John (Frida Krishnan with him) (Shafee & Co) for the plaintiff.
Rajasingam Gothandapani (P Thavamal and K Saraswsathy with him) (Shearn Delamore) for the defendants.

Abdul Malik Ishak J:

INTRODUCTION

[1] The learned counsel for both sides magnanimously agreed that two enclosures must be heard by me, one after the other. The first enclosure would be encl 59 which was the plaintiff's application for me to discharge myself from hearing and determining all further proceedings in this action including the trial thereof. The second enclosure would be encl 4 which was the plaintiff's *inter partes* application for an interlocutory injunction against the defendants. Thorough submissions were advanced by the learned counsel on both sides and it went on smoothly. I reserved my decision to 15 July 2005 in order to appreciate the submissions of the parties. Due weight was given to all the submissions of the learned counsel on both sides. Nothing was left to chance. My decision on both these two enclosures will now follow. I must stress that I kept an open mind when hearing these two enclosures bearing in mind that the main suit has not been heard as yet.

ENCLOSURE 59

[2] By this encl 59, the plaintiff sought for the following orders:

(1) that the honourable Dato' Hj Abdul Malik Hj Ishak J be at liberty to discharge himself from hearing and determining all further proceedings in this action including the trial thereof;

(2) that the costs of this application herein be provided for in such manner as this honourable court deems just;

(3) such further or other order or relief which this honourable court may deem fit, just and appropriate.

[3] Plain and simple it was an application by way of a summons in chambers to disqualify me from hearing and determining all further proceedings in this

action including the trial thereof. It was a recusal application to recuse myself from continuing to hear this case any further.

[4] Earlier there was a motion for committal as reflected in encl 36 against three defendants and that would include the third defendant by the name of Noruthen bin Sikandar Batcha. I had dismissed encl 36 with costs and I have since wrote a judgment and that judgment has since been reported vide Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors [2005] 5 MLJ 489 (hereinafter it shall be referred to as the 'first judgment'). The plaintiff was not happy with my first judgment and now he filed encl 59 to recuse myself, onceand for all. I must put on record that whatever I had decided in the first judgment, it was decided according to the evidence and nothing else. In the first judgment, the plaintiff cited the wrong newspaper and this was what I said (see p 497 of the [2005] 5 MLJ 489):

> I am now told at the bar, after enquiring, that the Tamil newspaper is known as 'Malaysia Nanban' and not 'Malaysian Nanban'. This meant that the notice of motion in encl 36 and the ex parte order of the court dated 1 December 2003 as per encl 9 referred to the wrong newspaper. In law, precision with words is an important asset.

[5] I continued to say in the first judgment as follows (see p 497 of the [2005] 5 MLJ 489 reporting):

> [14] Now, since encls 36 and 9 make reference to the wrong newspapers and it does not refer to the two articles, this court is constrained to and should dismiss encl 36 with costs forthwith. In fact, encl 36 should be dismissed in limine.

[6] That would have ended the fate of encl 36 forthwith and it would have been a short sweet judgment. But I was very cautious and, out of deference to the parties, I proceeded further. This was what I had said in the first judgment (see p 497 of [2005] 5 MLJ 489):

> Lest I be accused of an oversight and, in the event, I am wrong in arriving at this decision (commonsense should prevail here), I will now proceed to examine the arguments of the parties.

[7] In reality, by examining the arguments of the parties in the first judgment, I had decided encl 36 according to the evidence.

[8] In essence, the notice of motion for committal against the three defendants in encl 36 was dismissed with costs on a 'technical ground' in that the wrong newspaper was cited.

[9] Be that as it may, encl 59 was filed with a certificate of urgency containing an undertaking that the plaintiff would file and serve an affidavit in support in Bahasa Malaysia. In its original text, the certificate of urgency was worded in this way (see encl 61):

Perakuan Segera

Saya Jeffrey John (No K/P 710805–10–5085), seorang peguambela dan peguamcara Mahkamah Tinggi Malaya dengan ini mengesahkan bahawa pendengaran bagi permohon (it should be 'permohonan') plaintif untuk melucutkan Yang Arif Hakim daripada bertindak di dalam kedudukan kehakimannya, yang difailkan di sini perlu disegerakan dan oleh yang demikian saya mengakujanji yang versi Bahasa Malaysia berkenaan dengan segala dokumen yang telah difailkan di sini terlebih dahulu dalam Bahasa Inggeris, akan difailkan dalam masa dua minggu daripada tarikh dokumen-dokumen ini difailkan.

Bertarikh 31 Mei 2005.

[10] Unfortunately, the plaintiff has not filed an affidavit in support in Bahasa Malaysia. The affidavit in support as reflected in encl 60 was only filed in the English language. In my judgment, the failure to file an affidavit in support in Bahasa Malaysia constituted an infraction of the Rules of the High Court 1980 ('RHC'). Order 32 r 13(2)(a) of the RHC states as follows:

Save as otherwise provided in these rules:

(a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application.

[11] And such an affidavit, according to O 92 r 1 of the RHC, shall be in the national language. Bereft of an affidavit in support in the Bahasa Malaysia version, the plaintiff's application in encl 59 stood alone and it must be dismissed with costs. In fact, encl 59 should be dismissed in limine.

[12] Public confidence in the judiciary is eroded every time an applicant files an application to recuse a judge just like what the plaintiff did when he filed encl 59. According to Gopal Sri Ram JCA in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 (CA), the best way to avoid an application like encl 59 to be filed would be to invoke the contempt powers of the court. This was what his Lordship said in that case (see p 904 of the report):

In my judgment, it is a most serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the State than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

[13] Should I invoke 'the power to punish the plaintiff for contempt' when he filed encl 59? Certainly not. I have always been tolerant, on and off the bench, since becoming a judge. Unlike some people, I am not over sensitive to criticism. The sage words of Gopal Sri Ram JCA in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* must be recalled to mind. There, his Lordship succinctly said:

> Secondly, a judicial arbiter must decide any question presented to him for decision in the light of the objective facts and in accordance with settled principles. On no account should his personal sentiment enter upon the scene. Criticism of a judge is part of the territory in which he operates. So long as that criticism is made *bona fide*, based on fact and in conformity with law, none, least of all a judge, should mind: for there is no acquisition of knowledge without criticism. Over-sensitivity to criticism may result in ignorance, or much worse, intellectual arrogance. To decide a point in fear of criticism is to abdicate duty. These are matters that form part of a well-recognised judicial philosophy and should require no reiteration.

[14] Notwithstanding the absence of an affidavit in support in the Bahasa Malaysia version, I will now examine encl 59 at some length. This was done out of deference to the learned counsel on both sides. Now, encl 59 was supported by an affidavit affirmed by the plaintiff in the English language in contravention of O 92 r 1 of the RHC as seen in encl 60. The affidavit in reply to encl 60 would be encl 66 and it was affirmed in the national language (Bahasa Malaysia) in conformity with the RHC. I will refer to encls 60 and 66 in adjudicating encl 59.

[15] What was the basis for the recusal? The plaintiff advanced two grounds and they may be stated in this way. Firstly, that I had in the first judgment made specific findings of fact and of the character of the plaintiff imputed from what I have said in the first judgment that the plaintiff should not be 'over sensitive to criticism' and this, according to the plaintiff, effectively amounted to a pre-judgment of the issues raised in the action and therefore there was an appearance of bias on my part by reason of pre-judgment. Secondly, that I had in dismissing the plaintiff's application in encl 36 for committal justified the defendants' actions on the ground of their rights to freedom of speech and expression and that, by doing so, I must have first made a finding of guilt for the breach of the order of the court by the defendants and this amounted, according to the plaintiff, to an appearance of bias by reason of pre-judgment.

[16] In order to avoid any confusion and doubt, this was what the plaintiff said through his learned counsel in order to support the recusal's application in encl 59:

> (1) It was the plaintiff's contention that I had made such specific findings in the first judgment after analysing the affidavits filed and the issues surrounding the second article. And bearing in mind that the plaintiff's suit against the defendants was premised on libel, malicious falsehood and conspiracy, these specific findings by me in the first judgment effectively amounted to a pre-judgment of the issues which have been raised by the plaintiff in the main suit, so the plaintiff contended.
>
> (2) It was also contended by the plaintiff that after analysing the second article and by coming to the conclusion as I did in the first judgment in that the plaintiff 'should not be over sensitive to criticism'. I have justified the defendants' actions and concluded

that the same was justified on the grounds of 'freedom of speech and expression' and in coming to such a conclusion it was contended that I must have, in the first judgment, made a finding that the order of the court had been breached by the defendants.

(3) It was the plaintiff's contention that in holding in the first judgment that the second defendant by the name of Kumana Pupathi a/l Atimulam @ Athi Kumanan was only the editorial advisor of the first defendant and not the editor of the first defendant and consequently that the second defendant would have no control or responsibility for the publication of both the first and the second articles, I had clearly pre-judged the issue that the second defendant would also be exonerated of malicious falsehood and conspiracy to injure the plaintiff's reputation by publishing the first and the second articles against the plaintiff.

(4) It was submitted on behalf of the plaintiff that in view of my specific findings against the plaintiff in the first judgment wherein I had dismissed encl 36 with costs, it would appear to the ordinary, reasonable and well informed public that there is a real possibility of bias on my part to hear and determine the further proceedings in this action by reason of the pre-judgment which prejudiced the plaintiff's main suit.

(5) For all these reasons, it was submitted that I should be at liberty to discharge myself from hearing and determining all further proceedings in this action including the trial thereof.

[17] Should I recuse myself from hearing this case any further? That would be the crucial question to pose. I would answer this question in the negative.

[18] An additional ground in support of the plaintiff's recusal application was raised by the plaintiff's counsel in the course of his submission. This additional ground criticised the following specific finding in the first judgment (see p 531 of [2005] 5 MLJ 489):

> The second defendant, at all material times, has been the editorial adviser to the Malaysia Nanban. At no time did the second defendant advise, edit or write the two articles dated 3 December 2003 and 4 December 2003. It is the editorial staff of the Malaysia Nanban that is responsible for the publication of both the articles dated 3 December 2003 and 4 December 2003.

[19] But the plaintiff failed to quote the entire passage of that paragraph in the first judgment which passage started with the following words (see p 531 of [2005] 5 MLJ 489):

> It is the stand of the plaintiff that the second defendant is the editor of Malaysia Nanban and he is *prima facie* liable for taking part in publishing the two articles dated 3 December 2003 and 4 December 2003 respectively. The plaintiff even went to the extent of stating that the second defendant did not deny this in his affidavit dated 16 January 2004 as seen in encl 26. This is totally incorrect.

[20] Moreover, this additional ground was raised for the very first time by the plaintiff. This additional ground was not incorporated in the plaintiff's affidavit that was affirmed in the English language as seen in encl 60. The plaintiff should not be permitted to raise this additional ground at this point of time.

[21] Be that as it may, given the importance of an application like encl 59, the plaintiff should not only aver, under oath, of his fear that there is a real danger of bias on my part but the plaintiff too must proceed to set out, in his affidavit, the basis for his fear. In the absence of an affidavit in support affirmed in Bahasa Malaysia to support the plaintiff's application in encl 59, the success of encl 59 can never be assured.

[22] It was the submission of the plaintiff that all that was required of me to do in the first judgment was to determine if there was a breach of the court order dated 1 December 2003 as seen in encl 9 which would warrant an order of committal against the defendants. With respect, in the first judgment, I did just that and nothing more. The first judgment was, to use a familiar phrase, a 'speaking judgment'. In the first judgment, I did not proceed on a tangent and decide encl 36 on matters which were not specifically raised and submitted upon by the parties to the committal proceedings. In fact, the issue of whether the second defendant by the name of Kumana Pupathi a/l Atimulam @ Athi Kumanan was only the editorial advisor and not an editor of Malaysia Nanban was central to the second defendant's defence to the committal proceedings for the following reasons:

(1) the basis of the plaintiff's complaint in the committal proceedings against the second defendant was that he was the editor of Malaysia Nanban and hence he should take responsibility for the publication of the two articles dated 3 December 2003 and 4 December 2003;

(2) it was on that basis that the plaintiff obtained an *ex parte* leave on 4 February 2004 from my immediate predecessor to institute committal proceedings against the second defendant;

(3) the second defendant himself has affirmed an affidavit in encl 26 to deny that he was responsible for the publication of both the articles qua editor of Malaysia Nanban; and

(4) to further buttress the second defendant's affidavit in encl 26, the first defendant also affirmed an affidavit in encl 34 denying that the second defendant was an editor of Malaysia Nanban.

[23] It was wrong to say that I had pre-judged the main suit in the first judgment. In determining whether the defendants had breached the *ex parte* order of the court dated 1 December 2003 as seen in encl 9 by the publication of the two articles, I had in the first judgment and, in fact, I did undertake a qualitative analysis of the affidavit evidence presented before me then. I was only doing my job as a Judge and nothing else. I had to examine the relevant

affidavits in order to arrive at a just decision. To reiterate, the issue arising on the affidavits and on the submissions was whether the second defendant was the editor of the Malaysia Nanban which published the two articles. It was part and parcel of my function as a judge in adjudicating the committal application by way of a notice of motion in encl 36 to decide whether the second defendant was responsible for the publication of both the articles quo an editor of the Tamil newspaper and, consequently, whether the second defendant had breached the *ex parte* order of the court dated 1 December 2003 as seen in encl 9. Icertainly did not exceed my proper role as a judge when I adjudicated the notice of motion in encl 36. I was not over zealous in discharging my judicial function. I was just doing my job with no malice aforethought. Was it wrong for me to do my job and discharge my role as a judge according to the evidence? No one has influenced me in deciding the way I did in the first judgment. Everything was done above board. It is certainly a very serious matter to allege bias against a judge whose sole duty is only to decide a case according to the evidence presented before him (see the speech of Gopal Sri Ram JCA in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors*). With respect, the plaintiff has missed the woods for the trees. In adjudicating encl 36 as reflected in the first judgment, I did not pre-judge nor prejudice any of the issues raised by the plaintiff in the main suit. Incidentally, the issues to be determined in the main suit may be stated as follows:

(1) whether the impugned words in the selected articles were defamatory of the plaintiff?;

(2) whether the impugned words were true in substance and fact?; and

(3) whether the defendants were protected by the defence of qualified privilege?

[24] And none of these three main issues that will arise for determination in the main suit has been determined by me in the first judgment. It must be emphasised that my first judgment evidences a determination of the salient issues raised by the parties themselves and nothing else. It must also be emphasised that the complaint in the committal proceedings were directed at both the articles. Sadly, neither of these two articles are pleaded in the amended statement of claim. The articles that were pleaded in the amended statement of claim were wholly different articles.

[25] In my judgment, the plaintiff has miserably failed to establish a case to recuse myself from hearing and determining all further proceedings in this action including the trial itself. Unperturbed, I must proceed to hear and dispose of this case according to the evidence and the prevailing law. I cannot shirk from performing my judicial function. Unlike a medical practitioner, any mistake that will be made by me will be made right by the Court of Appeal and eventually the Federal Court. The mistake made by a medical practitioner while performing surgery will always be fatal.

[26] What is the correct test for recusal of a judge on the ground of bias? In delivering a separate judgment, NH Chan JCA in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* defined in his report, the word 'bias' in this way:

> Bias with regard to anyone acting in a judicial capacity means anything which tends or may be regarded as tending to cause such person to decide a case otherwise than on the evidence (*R v East Kerrier Justices* [1952] 2 QB 719*): Jowitt's Dictionary of English Law* (2nd Ed, Vol 1) under 'Bias' at p 210.

[27] And it is this definition of the word 'bias' that will be applied vigorously in this judgment. Indeed, the first judgment was decided purely on the evidence and there was therefore not even a semblance of bias in that judgment. I should not accede to 'an unfounded disqualification application' (per Callaway JA in the *Clenae* case (1999) VSCA 35 at para 89e) readily. I must be very cautious. If the idea of disqualifying me was to have the main suit tried by some other judge who would be more likely to decide the case in the plaintiff's favour then the plaintiff has fallen into an error. All the judges in Malaysia will decide their cases according to the evidence presented by the parties. Mason J in *Re JRL; ex p CJL* (1986) 161 CLR 342, at p 352, sounded a stern warning that should be heeded by all judges:

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

[28] Having said all that by way of a prelude, I must now allude to the correct test for recusal of a judge on the ground of bias. As a starting point, I must categorically say that the correct test for recusal of a judge is the 'real danger of bias' test as laid down by the House of Lords in *Regina v Gough* [1993] AC 646, particularly the speech of Lord Goff Of Chieveley at p 670 of the report:

> Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him; though, in a case concerned with bias on the part of a justices' clerk, the court should go on to consider whether the clerk has been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the applicant.'

[29] Now, the 'real danger of bias' test was followed by the following cases:

(i) by the House of Lords in the case of *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex p Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (HL), at p 589 where Lord Browne-Wilkinson delivering a separate judgment observed as follows:

> For the same reason, it is unnecessary to determine whether the test of apparent bias laid down in *R v Gough* [1993] 2 All ER 724, [1993] AC 646 ('is there in the view of the court a real danger that the judge was biased?') needs to be reviewed in the light of subsequent decisions'.

(ii) by the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65, *Locabail (UK) Ltd and another v Waldorf Investment Corp and others, Timmins v Gormley, Williams v HM Inspector of Taxes and Others, R v Bristol Betting and Gaming Licensing Committee, ex p O'Callaghan* [2000] 1 All ER 65 (CA), where Lord Bingham Of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC in a joint judgment said at p 83 of the report:

> The *R v Gough* test must be applied and the court must ask itself whether '… in the circumstances of the case … it appears that there was a real likelihood, in the sense of a real possibility, of bias …' on the part of the deputy judge (see [1993] 2 All ER 724 at 735, [1993] AC 646 at 668 per Lord Goff).

[30] Not to be left out in the cold, the Federal Court of Malaysia followed suit and vigorously applied the 'real danger of bias' test as enunciated in *R v Gough* [1993] 2 All ER 724, [1993] AC 646 in three different cases, namely:

(a) *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 (FC), where Edgar Joseph Jr FCJ speaking for the Federal Court at p 129 concluded that:

> Having given careful consideration to the matter we prefer the test of apparent bias given in *Gough* ('the real danger of bias' test) as this will avoid setting aside of judgments upon 'quite insubstantial grounds and the flimsiest pretexts of bias'.

(b) *Allied Capital Sdn Bhd v Mohamed Latiff Shah Mohd & another application* [2001] 2 MLJ 305 (FC) where the late Mohtar Abdullah FCJ said at p 263 of the report:

> Applying the 'real danger of bias' test, we are satisfied that the objection by Allied is without merit.

(c) *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 (FC), where Mohamed Dzaiddin CJ said at p 706 of the report:

> Having considered the authorities cited and their reasonings, we would follow *Gough* which is that the test to be applied in the present case is the 'real danger of bias' test. Hence, the question here is whether having regard to the facts and circumstances, was there a real danger of bias on the part of the learned trial judge when he heard the *habeas corpus* application involving the appellants.

[31] At the Court of Appeal level, the 'real danger of bias' test was applied in *Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15, particularly at p 52 thereof:

> The primary questions to consider should be: whether 'there was a real danger of bias on the part of the learned trial judge' (see *Mohamed Ezam bin Mohd Nor & Ors v Public Prosecutor* [2002] 1 MLJ 321 (FC)) and whether the allegation and the factual circumstance could have 'caused a fair-minded and informed bystander to entertain a fear of real danger of bias' — (see *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd &* Ors [2002] 4 MLJ 327*; Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65). Of course these questions would not be answered fairly by anyone who has a preconceived mind towards any particular judge or arbiter.

[32] The Court of Appeal in *Raphael Pura v Insas Bhd & Anor* [2001] 1 MLJ 113 also applied the 'real danger of bias' test.

[33] Dutifully, the High Courts in Malaysia also applied the 'real danger of bias' test in the following cases:

(a) *Bumicrystal Technology (M) Sdn Bhd v Rowstead Systems Sdn Bhd* [2004] 6 MLJ 169, where the learned Judicial Commissioner said at p 176 of the report:

> Disqualification of the judge, and the setting aside of any decision, would result if there was a real danger of bias. Reasonable suspicion or apprehension was not sufficient; the test was real danger. Clearly, if the judge himself did not know of the allegedly disqualifying interest, there could be no real danger of bias.

(b) *Insas Bhd & Anor v Raphael Pura* [1999] 4 MLJ 650, where the learned judge said at p 663 of the report after applying *R v Gough*:

> In my view, there must be a real danger, not a real likelihood of danger of bias.

(c) *Tai Choi Yu v The Tribunal of The Special Commissioners of Income Tax & Anor* [2004] 7 CLJ 127, where the learned Judicial Commissioner expressed no preference for either the 'real danger of bias' test or the 'real likelihood of bias' test.

[34] According to the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan*, the question of bias has to be answered by considering all the facts not merely by reference to the view of the hypothetical reasonable man.

[35] In applying the 'real danger of bias' test, the Court of Appeal in *Alor Janggus Soon Seng Trading Sdn & Ors v Sey Hoe Sdn Bhd & Ors* [2002] 4 MLJ 327 seems to suggest that the bias factor is to be read in the context of what would appear to the reasoned and well informed member of the public that there is a real possibility of bias on the part of the judge.

[36] After reading all these salient authorities, it would be appropriate to say that the 'real danger of bias' test is a more stringent test and that a mere suspicion, however reasonable, is not enough. It must be emphasised that surmise or mere conjecture is not enough to satisfy the test of 'real danger of bias'. According to Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors* [1968] 3 All ER 304, *R v London Rent Assessment Panel Committee, ex p Metropolitan Properties Co (FGC) Ltd* [1969] 1 QB 577, at p 599 that:

> There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'.

[37] Now, before me, the plaintiff alleged:

(1) that I had found against the plaintiff in adjudicating encl 36 as reflected in the first judgment which have a bearing during the trial of the main suit;

(2) that in the first judgment I had made an adverse finding of fact against the plaintiff; and

(3) all these would give rise to bias by reason of pre-judgment.

[38] In regard to the above finding of fact or the adverse comment in the first judgment, I have this to say. That the adverse finding of fact against the plaintiff would not, without more, amount to bias. In *Locabail* , the English Court of Appeal said at p 78 of the report that:

> The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.

[39] NH Chan JCA in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* held that the judge in that case should not have disqualified himself and this was what his Lordship said (see p 910 of the report):

> The jdge should not have disqualified himself. Just because the Judge had commented adversely on the credibility of the evidence before him in an interlocutory proceeding does not mean that he will not decide the case on the evidence adduced before him at the trial. To use the words of Blackstone, the law will not suppose a possibility of bias in a jdge whose authority greatly depends upon the presumption and idea that he is already sworn to administer impartial justice.

[40] Likewise here, the fact that I had dismissed encl 36 with costs as reflected in the first judgment must not be construed to mean that I would not decide the case on the evidence adduced before me at the trial of the main suit. I venture to say that an adverse finding of fact by a jdge against a party

in the earlier proceeding does not give rise to the real danger of bias on the part of the judge in the forthcoming proceeding. This would certainly ring true in the present case.

[41] On pre-judgment, I have this to say. That in the first judgment, I had stressed the ambiguity in the notice of motion in encl 36. At p 497 of [2005] 5 MLJ 489, in relation to the first judgment, this was what I had said:

> I must say that there is a world of difference between the official Malay language version and the English language version of the court order dated 1 December 2003 as seen in encl 9. There is therefore an ambiguity as to which articles published by the *Malaysia Nanban* are subject to the terms of the court order dated 1 December 2003. Luxmoore J sitting as an additional judge of the King's Bench Division in *Iberian Trust, Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87 aptly said at p 95 of the report:
>
> > If the court is to punish any one for not carrying out its order the order must in unambiguous terms direct what is to be done
>
> It is to be observed that the court order dated 1 December 2003 as per encl 9 makes no mention at all about the articles dated 3 December 2003 and 4 December 2003.

[42] Again, in the first judgment, I found that the first article dated 3 December 2003 was published before the defendants were given adequate notice by the plaintiff of the *ex parte* injunction order. In the first judgment, at p 507 of [2005] 5 MLJ 489, this what I said:

> To sum up, at the very earliest, the defendants would have had good and proper notice of the *ex parte* injunction order dated 1 December 2003 was at about 10am on 3 December 2003, by which time the first article of 3 December 2003 had been published.

[43] In regard to the second article dated 4 December 2003, this was what I said (see p 519 of [2005] 5 MLJ 489) in the first judgment:

> The second article (on 4 December 2003)
>
> > All the three defendants clearly had notice of the *ex parte* injunction order dated 1 December 2003 on and by 3 December 2003. But, by 4 December 2003, the writ of summons, the statement of claim, the *ex parte* summons in chambers and its supporting affidavits, in fact, the entire cause papers, had not been served on all three defendants and their solicitors. All these relevant cause papers were only served on 5 December 2003. That being the case, in the interim period, the defendants would not have been aware of the specific terms, phrases and issues that would cause them to be in breach of the *ex parte* injunction order dated 1December 2003.

[44] It must be borne in mind that, in the first judgment, the findings that were made were, in fact, made based on the available evidence and nothing else. In fact, the justification for the usage of the phrase 'freedom of speech and expression' in the first judgment as well as the statement that:

The plaintiff as well as this court should not be 'over sensitive to criticism (seep529 of [2005] 5 MLJ 489 in regard to the first judgment).

were made in the context of the issue of contempt which was not entirely similar to issues of defamation, libel and malicious falsehood.

[45] At any rate, the allegation of pre-judgment, in the light of the facts and circumstances of this case, cannot, in law, amount to a real danger of bias. I kept an open mind, ever willing to listen to the submissions of counsel on both sides and there certainly was no real danger of bias when I adjudicated encl 36 as reflected in the first judgment. With respect, the learned counsel for the plaintiff took whatever words I used in the first judgment out of context and conveniently magnified them out of proportion. It was just plain unfair. A perfectly fair judgment based on the evidence was made out to be unfair and bias. But there was certainly no real danger of bias. I have been sworn to administer justice in an impartial manner. If the plaintiff was unhappy with my decision in the first judgment, the best recourse would be to appeal to the Court of Appeal. It was as simple as that. By filing encl 59 the plaintiff was, in fact, obliquely eroding public confidence in the judiciary.

[46] In *The Queen v The Commonwealth Conciliation And Arbitration Commission And Others; ex p The Angliss Group* (1969) 122 CLR 546, the High Court of Australia held that the expression of an attitude of mind by members of the Commission which tended to favour the adoption of a certain principle of law and even the fact that a step has been taken in furtherance of such principles did not amount to pre-determination and were not sufficient to engender a reasonable suspicion in the mind of those who came before the tribunal, or in the minds of the public that the tribunal or its members might not bring a fair and unprejudiced minds to the resolution of the question arising before the tribunal.

[47] In the case of *In the matter of an application for a writ of prohibition against Justice Margaret Lusink of the Family Court of Australia & Jillian Joy Shaw ex p Brian William Shaw* (1981) 55 ALJR 12, the Australian Court held by a majority that although the judge had expressed very strong views, it could not reasonably be suspected that at the end of the case she would not decide the matter with a fair and unprejudiced mind. The Australian Court further held that it could not be concluded that she had decided that she would make an order of a particular kind irrespective of the state of the evidence at the end of the case and regardless of the arguments finally presented before her.

[48] In *R v Camborne Justices & Anor, ex p Pearce* [1955] 1 QB 41, the court held that the fact that a judge might be thought to have formed some opinion before hand that by itself should not constitute a ground to allege bias. The court was of the view that it was merely undesirable and that it did not appear improper for the judge to sit and hear the case.

[49] In *Vakauta v Kelly* (1989) 167 CLR 568, Dawson J writing a separate judgment had this to say (see pp 575 to 577 of the report):

> Preconceptions do not necessarily mean bias on the part of the judge who holds them. As was said by Charles J in *R v London County Council; Ex parte Empire Theatre* (1894) 71 LT 638, at p 639, 'preconceived opinions — though it is unfortunate that a judge should have any — do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded'. And in this court in *R v Australian Stevedoring Industry Board; e p Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, at p 116, a majority was of the opinion that when bias arising from preconceptions is in question, as distinguished from bias through interest, there must be strong grounds for finding its existence. A judge 'must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons'. In *Re JRL; ex p CJL* (1986) 161 CLR 342, at p 372, I expressed the view that suspicion of bias may well be ineradicable where the bias is thought to result from preconceptions existing independently of the case. That is so, but it is not to say that bias is inevitably displayed merely because a judge holds preconceptions or reveals that he does.
>
> Unfortunate or not, it is virtually unavoidable that a judge, sitting in a jurisdiction such as that in which the trial judge was sitting, should form some view concerning a party appearing in case after case and of the expert witnesses habitually called by that party. But, as was pointed out in *R v Commonwealth Conciliation and Arbitration Commission; ex p Angliss Group* (1969) 122 CLR 546, at p 554, a fair and unprejudiced mind 'is not necessarily a mind which has not given thought' to relevant matters or one which, having thought about them, 'has not formed any views or inclination of mind upon or with respect' to them.
>
> The question is, therefore, not whether the learned trial judge had preconceived views arising from his previous experience, but whether his preconceptions were of such a kind or were so expressed as to lead a reasonable person to apprehend that he was unable to approach the resolution of the case in a fair and even-handed manner without any inclination towards one side or the other.
>
> Whilst the language in which the trial judge expressed himself in the course of the trial may be regrettable, it would not, I think, without more, cause a fair-minded observer to apprehend that he was biased against the defendant in this case. Theremarks in question certainly disclose a view that the evidence given by the three doctors is usually slanted in favour of the GIO. But that of itself does not indicate that the trial judge would not accept their evidence in this case if it did not display that tendency, or justify an apprehension that he might not do so. Were his remarks indicative of a closed mind upon the question of the credibility of those witnesses, then it is clear from *Livesey's Case* that that may give rise to a reasonable apprehension of bias. But the remarks made by the trial judge about the three doctors carried with them no necessary implication of that kind. Nor did his remark made about the GIO preclude him from considering its case impartially. Indeed, to recognise a preconception and alert the parties to it is likely to assist rather than hinder an impartial approach. It is plain that, notwithstanding the views

which a judge may have formed in other cases, he may nevertheless be able to assess the evidence in the case before him fairly and to recognise when and where it does not confirm his previous experience. For these reasons, I do not think that the remarks made by the trial judge during the course of the trial were such as to indicate actual bias nor do I think that the parties or a member of the public could reasonably entertain an apprehension of bias on the part of the trial judge.

[50] I pause here for a moment and I wish to state that while I acknowledge that the other tests like the reasonable suspicion test or the real likelihood of bias test were vigorously applied in the following cases:

(1) *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors*;

(2) *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors*, *R v London Rent Assessment Panel Committee, ex p Metropolitan Properties Co (FGC) Ltd* [1969] 1 QB 577;

(3) *Webb v The Queen*, *Hay v The Queen* (1994) 68 ALJR 582; and

(4) *R v Papadopoulos (No 2)* [1979] 1 NZLR 629.

[51] Yet, I must categorically say that these decisions cannot and should not be construed as good law in the light of the Federal Court's decisions in the following three cases:

(a) *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan*;

(b) *Allied Capital Sdn Bhd v Mohamed Latiff Shah Mohd & another application*; and

(c) *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara*.

[52] I refused to accede to the plaintiff's application in encl 59. The application for recusal in encl 59 ought to be dismissed with costs to be paid by the plaintiff to the defendants forthwith pursuant to O 59 rule 4(1) RHC. That would be an appropriate order because the plaintiff has taken out an unnecessary application and the plaintiff's action in filing encl 59 was an improper action (*Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd* [1990] 1 MLJ 304; and *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730 (CA)). To borrow the words of the English Court of Appeal in *Locabail* at p 76 of the report, it would certainly be wrong for me 'to yield to a tenuous or frivolous objection' advanced by the plaintiff here. Furthermore, the plaintiff had filed encl 59 — the recusal application, on the very same day when encl 4 was set for hearing. Just like the court in *Bumicrystal Technology (M) Sdn Bhd v Rowstead Systems Sdn Bhd* [2004] 6 MLJ 169 which frowned upon a recusal application filed on the very same day that the case was set for hearing, I must likewise adopt the same attitude. In *The Queen v Watson; ex p Armstrong* (1976) 136 CLR 248, the court there also frowned upon an application for disqualification when the purpose was solely to ensure that the hearing will not proceed at the determined date. Darling J once said in *R v Sharman* (1930) 9 Cr App Rep 130 that:

A if the appellants are to be allowed to select the judges who shall hear their appeals, the business of the court could not be carried on.

[53] Here, the civil division at Wisma Denmark are still functioning at an unprecedented speed even though it is short handed. There are only three High Court judges, including myself, manning seven civil courts at Wisma B Denmark and it would be a sad day for the judiciary if the plaintiff adopts the attitude that I should be discharged from hearing and determining all further proceedings in this action for the 'flimsiest pretexts of bias' (to borrow the words of Edgar Joseph Jr FCJ in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* at p 129 of the report). C I refused to accede to encl 59. There was no real danger of bias at all.

ENCLOSURE 4

[54] In so far as the pleadings were concerned they comprised of the following: D

(1) the amended statement of claim dated 1 December 2003 as seen in encl 2; and

(2) the statement of defence dated 2 January 2004 as reflected in encl 19.

E **[55]** But the plaintiff did not file a reply to the defence. Such failure impacts on the plaintiff's application for an interim injunction resting on its cause of action of libel and malicious falsehood as reflected in encl 4. The defendants' have pleaded justification and qualified privilege in answer to the claim for libel and malicious falsehood. In a situation where the defendants' plead qualified F privilege, the law dictates that the plaintiff must deliver a reply to the defence pleading malice to negate the defence of qualified privilege. Order 78 of the RHC relates to defamation actions. Order 78 r 3(3) of the RHC reads as follows:

(3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained G of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply H giving particulars of the facts and matters from which the malice is to be inferred.

[56] There was no reply to the defence and the plaintiff cannot plead malice by way of an affidavit. In my judgment, the plaintiff has not complied with O78 r 3(3) of the RHC. I

[57] In *Halim bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors* [2001] 6 MLJ 353, the High Court held that where the plaintiff fails to file a reply and fails to

allege express malice, an allegation in the amended statement of claim that the defendant 'falsely and maliciously' published the words complained of is not a plea of express malice and will not operate to negate the defence of qualified privilege available to the defendant.

[58] In *Rajagopal v Rajan* [1972] 1 MLJ 45, the Federal Court observed that while it is for the defendant to prove the facts and circumstances which establish the occasion as privileged, the burden of showing actual or express malice rests on the plaintiff.

[59] In the *White Book*, the learned authors have this to say at para 82/3/6 at pp 1551 to 1552:

> Particulars of the facts and matters from which … malice is to be inferred (para (3)) — In his statement of claim, the plaintiff pleads that the defendant 'falsely and maliciously published' or 'falsely and maliciously spoke and published' the words complained of. But if the libel or slander is published without lawful excuse, the law conclusively presumes that the publisher is actuated by that malice, which gives the injured party a cause of action, and accordingly (notwithstanding O 18 r 12(1)(b)) the plaintiff need not give particulars of the facts on which he relies in support of the allegation of malice. This is sometimes called 'malice in law'. But if there is a lawful excuse for the publication (as, for example, where it is an occasion of qualified privilege) by which the inference of law is prima facie rebutted, the onus is thrown upon the plaintiff of proving the existence as a fact of the malice necessary to maintain the action. The latter is sometimes called 'malice in fact' or 'express malice' (see eg *Harris v Arnott (No 2)* (1890) 26 LRIr 75; *Jones v Hulton (E)* [1909] 2 KB 444 at 477) and the plaintiff must serve a reply pleading malice and giving the particulars referred to in para (3) of this rule. The effect of malice in relation to a defence of fair comment on a matter of public interest is the same as in regard to a defence of qualified privilege, for comment which may be fair in the mouth of one person may be actionable if published by a person actuated by malice (*Thomas v Bradbury & Agnew Ltd* [1906] 2 KB 627).

[60] In *Dato' Wan Hashim bin Hj Wan Daud v Mazlan bin Ibrahim & Anor* [1998] 5 MLJ 176, the High Court held that there was a distinction to be drawn between express malice and malice in law. Malice in law may be presumed from the fact of publication of defamatory words and the plaintiff need not prove it whereas express malice which is actual malice or malice in fact had to be pleaded or proved by the plaintiff. That O 78 r 3(3) of the RHC refers to express malice and not malice at law. The High Court further observed that the failure of the plaintiff to serve the reply would prevent the plaintiff from adducing evidence of actual malice which was necessary to rebut the defence of qualified privilege or fair comment raised by the second defendant.

[61] *Halsbury's Laws of England* (4th Ed, Vol 28) at p 79, at para 150 carries an interesting passage and it states as follows:

> 150 Burden and standard of proof. If a plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in the

statement of claim give particulars of the facts on which he relies in support of the allegation of malice but, if the defendant pleads fair comment on a matter of public interest or that publication was on a privileged occasion and the plaintiff intends to allege the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

[62] In a nutshell, all these authorities point to this. That the plaintiff's failure to comply with O 78 r 3(3) of the RHC must mean that the defendants' plea of qualified privilege stood unassailed. The plaintiff was not in a position to submit that the defendants' plea of qualified privilege was bound to fail.

[63] I will now allude briefly to the facts of the case in the context of encl 4. In doing so I may inevitably repeat what I have said in the first judgment. That would be perfectly legitimate.

[64] The plaintiff is the President of the Malaysian Indian Congress ('MIC'), a political party. The plaintiff is also a cabinet minister. The first defendant publishes the Tamil daily by the name of '*Malaysia Nanban*'. At all material times and right up to his demise on 28 March 2005, the second defendant was the editorial advisor of *Malaysia Nanban*. On 1 December 2003 the plaintiff brought the present action against the defendants. The plaintiff fastened his claim on conspiracy, malicious falsehood and libel.

[65] The plaintiff took umbrage to the following 10 publications of which five were pleaded in the amended statement of claim whilst the remaining five were merely mentioned in the amended statement of claim:

(a) news article dated 11 November 2003 encaptioned '*An Appeal to Dato' Seri Samy Vellu from Ordinary Athi Kumanan*' (see para 8(b) of the amended statement of claim);

(b) news article dated 12 November 2003 encaptioned '*The whole country knows who is the liar. He has touched the nest of the hornets. We will hound and sting Samy Vellu*' (see para 8(c) of the amended statement of claim);

(c) news article dated 13 November 2003 encaptioned '*Samy Vellu who said that Pandithan is lying is alone lying*' (see para 8(d) of the amended statement of claim);

(d) news article dated 14 November 2003 encaptioned '*A Secret Letter Sent To Tun Mahathir. How Can Samy Vellu Release? A Police Complaint Will be Made. Samy might be sentenced to 7 years in Prison*' (see para 8(e) of the amended statement of claim);

(e) news article dated 15 November 2003 encaptioned '*Police Complaint Against Dato' Seri Samy Vellu*' (see para 8(f) of the amended statement of claim);

(f) news article dated 16 November 2003 encaptioned '*What happened to RM100 million given to MAIKA by the Indian Community Dato'*

Seri Samy Vellu must give an answer, Pandithan who collected RM7 million (For MAIKA) asks' (see para 8(f) of the amended statement of claim);

(g) news article dated 17 November 2003 entitled 'RM100 million given by Indian Community in trust to Samy Vellu is embezzled. Nationwide Police Complaints' (see para 8(f) of the amended statement of claim);

(h) news article dated 18 November 2003 encaptioned '*Poor Indian Community In Misery*' (see para 8(g) of the amended statement of claim);

(i) news article dated 18 November 2003 entitled '*See the track record of Samy Vellu. 79 million lost in all companies belong to Maika*' (see para 8(g) of the amended statement of claim); and

(j) news article dated 18 November 2003 encaptioned '*To bring about reformation in the Indian community — to put an end to Samy Vellu's degrading speech. Come together as a united front, a united force. IPF National leader Datuk MG Pandithan*' (see para 8(h) of the amended statement of claim).

[66] There was a blatant failure on the part of the plaintiff to plead the precise defamatory words in the amended statement of claim and that would be prejudicial to the plaintiff's case. It is trite law that a plaintiff in a libel action must plead, *inter alia*, the defamatory words complained of.

[67] *Atkin's Encyclopaedia of Court Forms In Civil Proceedings* (2nd Ed, Vol 25, 1998 Issue) at p 69 states as follows:

> 9 The words complained of. The statement of claim must set out the precise words (The term 'words' includes pictures, visual images, gestures and other methods of signifying meaning: Defamation Act 1952 s 16(1), 24 *Halsbury's Statutes* (4th Ed) LIBEL AND SLANDER). For the common law position, see for example, *Case de Libellis Famosis* (1605) 5 Co Rep 125a (gallows); *Du Bost v Beresford* (1810) 2 Camp 511 (picture); *Smith v Wood* (1812) 3 camp 323 (caricature); *Monson v Tussauds Ltd* [1894] 1 QB 671, CA (waxwork); *Ralston v Ralston* [1930] 2 KB 238 (tombstone); and *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, CA (film). See also para 12 note 1 post) complained of and should not allege that the defendant published words 'to the following effect' (*Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 771, 772, HL; *Harris v Warre* (1879) 4 CPD 125. See the *Supreme Court Practice* 1997 paras 18/12/10 (libel), 18/12/15 (slander). If the plaintiff fails to plead with reasonable certainty the words of which he complains he can be required to give particulars of the publication complained of, to show that he has a proper case to put before the court and is not merely fishing for one (*Collins v Jones* [1955] 1 QB 564, [1955] 2 All ER 145, CA, where the plaintiff was ordered to give (before service of the defence) particulars of the date, time and place of the publication of the letters in question and of the precise words alleged to have been set out in each letter. The words complained of must

be set out with reasonable certainty: a plaintiff cannot sue 'on a letter which he has never seen and of whose contents he is unaware': *Collins v Jones* [1955] 1 QB 564, [1955] 2 All ER 145, CA, and see Form 90 post. See also *British Data Management plc v Boxer Commercial Removals plc* [1996] 3 All ER 707, CA and *28 Halsbury's Laws* (4th Ed) title LIBEL AND SLANDER para 171. In a proper case, however, the plaintiff may apply before service of the statement of claim, for leave to administer interrogatories: see para 34 note 4 post and Form 114 post).'

[68] This would be followed by the write-ups in Gatley on *Libel And Slander* (9th Ed) at pp 652 to 653:

Setting out words complained of: *libel.* In a libel the words used are the material facts and must therefore be set out verbatim in the statement of claim, preferably in the form of a quotation: it is not enough to describe their substance, purport or effect (*Harris v Warre* (1879) 4 CPD 125 at 127, 129; *Wood v Brown* (1815) 6 Taunt, 169; *Wright v Clements* (1820) 3 B & Ald 503; *Darbyshire v Leigh* [1895] 1 QB 554, per Lord Esher MR at 587, per Lopes LJ at 588; *Hay v Bingham* (1902) 5 Ontario LR 224; *Berry v Retail Merchants* (1924) 18 SaskLR 283; *Shannon v King* (1931) 4 DLR 438; *Collins v Jones* [1955] 1 QB 564, CA; *Rosen v Alberta Motor Assn Insurance* [1994] 1 WWR 719; *Kerr v Haydon* [1981] 1 NZLR 449. Order 18 r 7(2), does not affect the rule in the text, for the words of the libel are themselves material. It is unnecessary for the plaintiff to add to the words set out in the statement of claim 'or words to the like effect' for he is entitled to have it put before the jury that the words proved 'are substantially to the same effect as the words alleged'; per Bankes and Atkin LJJ in *Tournier v National Provincial Bank* [1924] 1 KB 461 at 469, 487, or 'amaterial and defamatory part of the words complained of': *ibid* at 478 per Scrutton LJ; *Conway v Westwood* (1936) NPD 245). 'The law requires the very words of the libel to be set out in the declaration in order that the court may judge whether they constitute a ground of action (per Abbott CJ in *Wright v Clements* (1820) 3 B & Ald 503 at 506, and per Holroyd J at 509; *Capital and Counties Bank v Henty* (1882) 7 App Cas. 741 per Lord Blackburn at 771, 772; 'In libel you must declare upon the words; it is not sufficient to state their substance'; per Palles CB in *Fitzsimmons v Duncan Ltd* [1908] 2 Ir R 483 at 499). A plaintiff is not entitled to bring a libel action on a letter which he has never seen and of whose contents he is unaware. He must in his pleading set out the words with reasonable certainty …. The court will require him to give particulars so as to ensure that he has a proper case to put before the court and is not merely fishing for one (*Collins v Jones* [1955] 1 QB 564 per Denning LJ at 571. For possible methods of coping with this difficulty see & 26.16, below).

[69] According to *Sydenham v Man* (1617) Cro Jac 407; *R v Brereton* (1725) 8 Mod 329; *Rubenstein v Truth and Sportsman Ltd* [1960] VR 479 and *Ron Hodgson v Belvedere Motors* (1971) NS WLR 472 the particular passages complained of should be clearly identified and set out. The court in *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 held that a claim for libel could not be founded on a headline or photograph alone where the ordinary reader could not have failed to read further and to see at once that the headline and pictures were not to be taken at face value. And according to the case of *Bookbinder v Tebbit* [1989] 1 WLR 640, 647 that where the plaintiff intends to allege that the

meaning of the words is affected by the context in which they were written or spoken, he should include the contextual material in the pleading. Hunt J in *Gordon v Amalgamated Television Services* [1980] 2 NSWLR 410 aptly said at p 413 of the report:

> Where the publication sued upon is in written form, a plaintiff is obliged to include within his pleading every passage which materially alters or qualifies the complexion of the imputation complained of.

[70] It would be appropriate to say that the pleadings in the amended statement of claim do not comply with the law as stated above. My observations of the plaintiff's pleadings may be listed as follows:

(1) that the pleadings in support of the libel claim are lacking in particulars and are defective;

(2) that the plaintiff takes umbrage to 10 news articles;

(3) that there are only two paragraphs in the amended statement of claim that are dedicated to the cause of action of libel and these would be paras 12 and 13; and that the alleged offending words of those 10 news articles have not been pleaded under paras 12 and 13 of the amended statement of claim;

(4) that the alleged offending words in five out of the 10 news articles are reproduced in paras 8(b), 8(c), 8(d), 8(e) and 8(h);

(5) that the remaining five are merely referred to by their respective captions, three of whom are found in para 8(f) while the other two are found in para 8(g);

(6) that the alleged offending words for those five news articles referred to under paras 8(f) and(g) have not been reproduced or pleaded in the amended statement of claim; and

(7) that para 8 is, in fact, dedicated to the cause of action of malicious falsehood and not libel.

[71] At this juncture, it would be appropriate to set out the orders which the plaintiff sought for in encl 4:

(1) for an order that the defendants, and each of them, whether by themselves, their agents or servants or otherwise be restrained by an injunction, until further order of this honourable court, from engaging in and continuing with the present campaign, or otherwise, of publishing and concerning the plaintiff, whether in the newspaper 'Malaysian Nanban' (it should be 'Malaysia Nanban'), or any other publication, imputing any of the matters or allegations contained in Appendix A and Appendix B (annexed to this summons in chambers) arising out of the daily articles published of the plaintiff between 11 November 2003 and 18 November 2003 in the said Malaysian Nanban (it should be 'Malaysia Nanban').

(2) the costs of and occasioned by this application be in the cause.

(3) such further and other directions and relief that this honourable court deems fit and proper.

[72] The grounds in support of encl 4 are amply set out in the affidavit of the plaintiff affirmed on 29 November 2003 as seen in encl 5 and the further affidavit of the plaintiff affirmed on 29 November 2003 as reflected in encl 6. Briefly, the grounds may be stated as follows (see encl 4 thereof):

(1) The defendants have waged a daily campaign against the plaintiff, since at least 11 November 2003, in the Tamil newspaper called *Malaysian Nanban* (it should be '*Malaysia Nanban*') where they have published matters concerning the plaintiff which are a malicious falsehood and a grave libel of the plaintiff by way of his political office as President of MIC and Minister of Works in the Government of Malaysia.

(2) Unless restrained by the order sought herein, the defendants are likely to continue with their daily campaign of publishing the said articles denigrative of the plaintiffs as stated above.

(3) The balance of convenience lies in favour of the injunction as prayed for because of the daily and systematic publication engaged by the defendants in a reckless manner and without regard to its truth.

(4) Damages will not be an adequate remedy for the plaintiff because it concerns the reputation and the political office of the plaintiff.

[73] Of course, in adjudicating encl 4, I too took into account the following affidavits:

(a) the affidavit of the second defendant that was affirmed on 30December 2003 as seen in encl 17;

(b) the affidavit of Periasamy a/l Munisamy that was affirmed on 31 December 2003 as seen in encl 18;

(c) the plaintiff's third affidavit that was affirmed on 5 January 2004 as reflected in encl 23;

(d) the affidavit of the second defendant that was affirmed on 7January 2004 as seen in encl 30;

(e) the amended statement of claim; and

(f) the defence.

[74] The plaintiff's claim against the second defendant by the name of Kumana Pupathi a/l Atimulam @ Athi Kumanan must be examined by taking into account the death of the second defendant on 28 March 2005. It was an untimely death. As a result thereof, I had on 9 May 2005 ruled that the only surviving cause of action against the deceased second defendant was for the tort of malicious falsehood and that the other two causes of action, namely,

libel and conspiracy to injure abated upon the death of the second defendant. My ruling on 9 May 2005 can be seen in an unreported judgment vide civil suit no: S6-23-72-2003 (now reported in [2005] 5 MLJ 489):

Dato' Seri S. Samy Vellu

vs

(1) Penerbitan Sahabat (M) Sdn Bhd

(No: Syarikat 157000-T)

(sebagai penerbit Akhbar 'Malaysia Nanban)

(2) Kumana Pupathi a/l Atimulam @ Athi Kumanan

(3) Noruthen bin Sikandar Batcha

(No: 2).

and that judgment has since been circulated to all the parties (hereinafter referred to as the 'unreported judgment').

[75] This present judgment forms the third judgment written by me in regard to the same case.

[76] Now, in the light of the second defendant's demise and in view of my ruling on 9 May 2005 as reflected in the unreported judgment, the plaintiff's application for an interim injunction now rests entirely on the following causes of action:

(a) as against the first defendant
  (i) conspiracy;
  (ii) libel; and
  (iii) malicious falsehood.
(b) as against the second defendant
  (i) malicious falsehood.

[77] It is quite interesting to read the statement of defence. The defendants pleaded justification and qualified privilege. The defendants relied on the principles of pleading justification by following cases like *Polly Peck (Holdings) PLC & Ors v Trelford & Ors* [1986] 1 QB 1000, (CA); and *Lucas-Box v News Group Newspapers Ltd* (1983 L No 333), *Same v Associated Newspapers Group Plc & Ors* (1983 L No 336) (1986) 1 WLR 147 (CA). These two cases stated the law pertaining to pleading justification in this way. That where the plaintiff has selected certain words from a publication and pleaded that in their natural and ordinary meaning they are defamatory of him, the defendant is entitled to look at the whole of the publication in order to aver that in their context the words bear a meaning different from that alleged by the plaintiff and to

plead that in that meaning the words are true. It is germane to mention that the *Polly Peck* and *Lucas-Box* principles have been received and applied vigorously by the Court of Appeal in Singapore in the case of *Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action* [1998] 3 SLR 337 where Yong Pung How CJ delivering the judgment of the Court of Appeal aptly said at pp 359 to 360 of the report:

> Thus it was said that, unless the plaintiff is pinned to the meaning that he has pleaded, it would be impossible for the defendant to decide how to justify the alleged defamatory words. However, since the decision of the Court of Appeal in England in *Lucas-Box v News Group Newspaper Ltd* [1986] 1 WLR 147 the law governing the practice of pleading the defence of justification has changed. It was there held, *inter alia*, that the defendant in pleading justification has to plead the meaning he seeks to justify. *Lucas-Box* has been considered, clarified and applied in subsequent cases: see Polly *Peck v Trelford, Viscount De L'Isle v Times Newspapers Ltd* [1988] 1 WLR 49, *Prager v Times Newspapers Ltd* [1988] 1 WLR 77, and *Morrell v International Thomson Publishing Ltd & Ors* [1989] 3 All ER 733, and was followed by the High Court in Singapore in *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390; [1989] SLR 1063, and was also applied by this court in *Aaron v Cheong Yip Seng* [1996] 1 SLR 623. The position was summed up by May LJ in *Morrell* at pp 737–738: In any event I think the position now is that a defendant who pleads justification must do so in such a way as quite clearly, without circumlocution or obfuscation, to inform the plaintiff and the court of precisely what meaning or meanings the defendant may seek to justify. Although this may be done in the particulars of justification, there is then a substantial risk that the precise meaning will be lost in words. I see no reason why the meaning or meanings should not be set out directly, briefly and at the start of the plea.

[78] In pleading qualified privilege, the defendants relied heavily on the following cases:

(a) *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [1999] 4 MLJ 58 (HC);

(b) *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [2001] 1 MLJ 305 (CA);

(c) *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [2001] 2 MLJ 65 (FC);

(d) *Lange v Atkinson* [1998] 3 NZLR 424 (Court of Appeal Wellington);

(e) *Lange v Atkinson and another* [1998] 3 NZLR 424 (Privy Council) (Lords Nicholls of Birkenhead, Steyn, Cooke of Thorndon, Hope of Craighead, Hobhouse of Woodborough);

(f) *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (High Court of Australia with a coram of Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); and

(g) *Reynolds v Times Newspapers Ltd & Ors* [1998] 3 WLR 862, Court of Appeal with a coram of Lord Bingham of Cornhill CJ, Hirst and Robert Walker LJJ.

[79] Now, the decision of Lord Bingham of Cornhill CJ in Reynolds should be referred. There his Lordship at pp 899 to 900 in fine language said:

> It seems to us on the strength of this very powerful and consistent line of authority, that the ultimate question in each case is whether the occasion of the particular publication, in the light of its particular circumstances, contains the necessary ingredients to give rise to the privilege, always bearing in mind that the rule is an aspect of public policy as epitomised in Parke B's statement in *Toogood v Spyring* 1 CM & R 181, 193, that the protection must be 'fairly warranted by any reasonable occasion or exigency'. In this context we should note that Lord Lester at one stage submitted that those words were used in the context of malice and not of privilege, but we are quite unable to accept that proposition, which goes against the grain not only of *Toogood's* case itself, but also of the subsequent authorities.
>
> Lord Lester also stressed, rightly, that the circumstances that constitute a privileged occasion 'can themselves never be catalogued and rendered exact' (per Lord Buckmaster LC in the *Greenlands* case [1916] 2 AC 15, 22), but this in our judgment signifies that the established principles must be applied to the particular circumstances of individual cases in their infinite variety, not that the principles themselves are unduly elastic.
>
> It follows that in our judgment, when applying the present English common law of qualified privilege, the following questions need to be answered in relation to any individual occasion.
>
> (1) Was the publisher under a legal, moral or social duty to those to whom the material was published (which in appropriate cases, as noted above, may be the general public)to publish the material in question? (We call this the duty test).
>
> (2) Did those to whom the material was published (which again in appropriate cases may be the general public) have an interest to receive that material? (Wecall this the interest test).
>
> (3) Were the nature, status and source of the material, and the circumstances ofthe publication, such that the publication should in the public interest beprotected in the absence of proof of express malice? (We call this the circumstantial test).
>
> We make reference to 'status' bearing in mind the use of that expression in some of the more recent authorities to denote the degree to which information on a matter of public concern may (because of its character and known provenance) command respect: see the *Perera* case [1949] AC 1, 21; the *Webb* case [1960] 2 QB 535, 568; *Blackshaw v Lord* [1984] QB 1, 26 and 35; and also the judgment, in chambers, of Eady J in *Youngerwood v Guardian Newspapers Ltd* (unreported) 13 June 1997. The higher the status of a report, the more likely it is to meet the circumstantial test. Conversely, unverified information from unidentified and unofficial sources may have little or no status, and where defamatory statements of fact are to be published to the widest audience on the strength of such sources, the publisher undertakes a heavy burden in showing that the publication is 'fairly warranted by any reasonable occasion or exigency'. In *Blackshaw v Lord* [1984] QB 1, 27, Stephenson LJ gave some examples which put the requirement quite high:

There may be extreme cases where the urgency of communicating a warning is so great, or the source of the information so reliable, that the publication of suspicion or speculation is justified; for example, where there is a danger to the public from a suspected terrorist or the distribution of contaminated food or drugs; but there is nothing of that sort here.

So far as malice is concerned it is important to bear in mind the heavy burden resting on the plaintiff, as authoritatively stated by Lord Diplock in *Horrocks v Lowe* [1975] AC 135.

[80] That would be food for thought.

[81] The defendants here have particularised the plea of justification and qualified privilege in this way:

(a) news article dated 11 November 2003 encaptioned '*An Appeal to Dato' Seri Samy Vellu from Ordinary Athi Kumanan*' (see para 8(b) of the amended statement of claim), and it must be noted that the defendants pleaded justification in paras 26.1 to 26.11 and pleaded qualified privilege in paragraph 26.12 of the statement of defence;

(b) news articles dated 12 November 2003 encaptioned '*The whole country knows who is the liar. He has touched the nest of the hornets. We will hound and sting Samy Vellu*' (see para 8(c) of the amended statement of claim) and it must be noted that the defendants pleaded justification in paras 27.1 to 27.11 and pleaded qualified privilege in paragraph 27 December of the statement of defence;

(c) news article dated 13 November 2003 encaptioned '*Samy Vellu who said that Pandithan is lying is alone lying*' (see para 8(d) of the amended statement of claim), and it must be noted that the defendants pleaded justification in paras 28.1 to 28.5 and pleaded qualified privilege in para 28.6 of the statement of defence;

(d) news article dated 14 November 2003 encaptioned '*A Secret Letter Sent To Tun Mahathir. How Can Samy Vellu Release? A Police Complaint Will Be Made. Samy might be sentenced to 7 years in Prison*' (see para 8(e) of the amended statement of claim), and it must be noted that the defendants pleaded justification in paras 29.1 to 29.6 and pleaded qualified privilege in paragraph 29.7 of the statement of defence;

(e) news article dated 15 November 2003 encaptioned '*Police Complaint Against Dato' Seri Samy Vellu*' (see para 8(f) of the amended statement of claim), and it must be noted that the defendants pleaded justification in paras 30.1 to 30.4 and pleaded qualified privilege in para 30.5 of the statement of defence;

(f) news article dated 16 November 2003 encaptioned '*What happened to RM100 million given to MAIKA by the Indian Community Dato' Seri Samy Vellu must give an answer, Pandithan who collected RM7 million (For MAIKA) asks*' (see para 8(f) of the amended statement of claim), and it must be noted that the defendants pleaded justification in paras 31.1 to 31.4 and pleaded qualified privilege in para 31.5 of the statement of defence;

(g) news article dated 17 November 2003 encaptioned '*RM100 million given by Indian Community in trust to Samy Vellu is embezzled. Nationwide Police Complaints*' (see para 8(f) of the amended statement of claim), and it must be noted that the defendants pleaded justification in paras 32.1 to 32.8 and pleaded qualified privilege in para 32.9 of the statement of defence;

(h) news article dated 18 November 2003 encaptioned '*Poor Indian Community in Misery*' (see para 8(g) of the amended statement of claim), and it must be borne in mind that the defendants pleaded justification in paras 33.1 to 33.5 and pleaded qualified privilege in para 33.6 of the statement of defence;

(i) news article dated 18 November 2003 encaptioned '*See the track record of Samy Vellu. 79 million lost in all companies belong to Maika*' (see para 8(g) of the amended statement of claim); and it must be emphasised that the defendants pleaded justification in paras 34.1 to 34.2 and pleaded qualified privilege in para 34.3 of the statement of defence; and

(j) news article dated 18 November 2003 encaptioned '*To bring about reformation in the Indian Community — to put an end to Samy Vellu's degrading speech. Come together as a united front, a united force. IPF National leader Datuk MG Pandithan*' (see para 8(h) of the amended statement of claim), and it must be noted that the defendants pleaded justification in paras 35.1 to 35.2 and pleaded qualified privilege in para 35.3 of the statement of defence.

[82] Interestingly the affidavits of the defendants showed the defences of justification and qualified privilege.

[83] I will now go to the heart of the matter. I will briefly state the principles of governing the grant of interlocutory injunctions in the context of the present case. It is this. That where a defendant pleads justification and/or qualified privilege and swears that he will seek to prove at the trial the defence of justification and/or qualified privilege, the court will not grant an injunction unless exceptionally the court is satisfied that the defence is one that cannot succeed. This simple proposition of the law has been crystallised for more than a hundred years by the following three main decisions:

(a) *Quartz Hill Consolidated Gold Mining Co v Beall* (1882) 20 Ch D 501 where Lindley LJ had this to say at pp 511 to 512:

> But when a party comes to ask the court to restrain the publication of a document as libellous which appears on the face of it to be a privileged communication, I think that the utmost possible caution is requisite before the court interferes. I do not mean to say that if it was made plain even upon interlocutory application that a privileged communication was malicious, that is to say, if the plaintiff could prove (the burden of proof being on him in all such cases) that the defendant had so far abused his privilege as to render the publication actionable, an injunction ought not to be granted; but the court ought to be very careful before it restrains the issuing of that which is *prima facie* a privileged communication. Now, if we bear in mind that the burden of proof is entirely on the plaintiffs to shew that this is a malicious libel, the occasion being privileged, the evidence is utterly worthless, and does not deserve consideration. It appears to me that on that ground, to say nothing of the other grounds which have been mentioned, this injunction ought not to have been granted.

(b) *William Coulson & Sons v James Coulson & Co* (1886-87) 3 TLR 846 where Lord Esher MR said at p 846:

> To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find the court would set aside the verdict as unreasonable. The court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion that there was malice on the part of the defendant. It followed from those three rules that the court could only on the rarest occasions exercise their jurisdiction. In the present case his Lordship could not go the length of saying that it would be unreasonable in the jury to find that this was not a libel, and therefore, in accordance with the first rule laid down, the court ought not to grant an interim injunction. The injunction must be dissolved, the costs to abide the event of the trial.'

(c) *Bonnard v Perryman* (1891) 2 Ch D 269 where North J said at pp 274 to 275 of the report:

> And so far as that goes I quite agree that a jury is the proper tribunal to decide whether this is or is not the libel it is alleged to be. But the difficulty is this, that I have to consider now whether the publication of this article should or should not be continued in the meantime, and that, inasmuch as I have come to the conclusion that, unless I restrain it, it will be continued, I have no course but to consider for myself as well as I can whether it is a case in which an interlocutory injunction should be granted.

> The principles of the court are expressed in several cases, but I think it sufficient to refer to one of them. That is the case of the *Quartz Hill Consolidated Gold Mining Co v Beall* 20 Ch D 501 before the Court of Appeal. In that case there had been a circular distributed amongst the shareholders in a company reflecting on the conduct of persons interested in it, and *Sir George Jessel* in giving judgment says this *ibid*. 507: The result, therefore, is that there is jurisdiction in a proper case upon interlocutory application to restrain the further publication of a libel. What I have said is confirmed by *Beddow v Beddow* 9 Ch D 89, *Shaw v Earl of Jersey* 4 CPD 120, 359, and *Day v Brownrigg* 10 Ch D 294. But the question as to whether the jurisdiction though existing has been properly exercised is quite different. It is a jurisdiction which must be very carefully exercised. No doubt there are cases in which it would be quite proper to exercise it, as, for instance, the case of an atrocious libel wholly unjustified and inflicting the most serious injury on the plaintiff. But, on the other hand, where there is a case to try, and no immediate injury to be expected from the further publication of the libel, it would be very dangerous to restrain it by interlocutory injunction. I entirely accept that as binding upon me, and intend to be governed by it.

Continuing at p 276 of the report, North J said:

> Referring again to the case of *Quartz Hill Consolidated Gold Mining Co v Beall* the Master of the Rolls says 20 Ch D 508: 'In the present case I think the objections to the exercise of the jurisdiction are, at least three.' One I have dealt with, that was the question of intention to continue the publication. 'In the first place the alleged libel is not proved to be untrue'. Then he says this: 'As a general rule the plaintiff who applies for an interlocutory injunction must shew the statement to be untrue.' Then he goes on to point out that in that case there was no evidence that it was untrue except the evidence of a person on behalf of the plaintiffs, the secretary of the plaintiff company, who said that he believed it to be untrue, and on the other hand the defendant had pledged his oath that he verily believed it was true. In that state of things the court refused to interfere.

[84] Again continuing at p 277 of the report, North J. had this to say:

> Then in *Quartz Hill Consolidated Gold Mining Co v Beall* 20 Ch D 501, to which I have referred, and which I take as a guide to follow, there was a third point involved — namely, the difficulty of granting an interlocutory injunction where the alleged libel was apparently on its face a privileged communication, and the difficulty there was of going into any question of express malice on an interlocutory application. That point does not arise here, because I do not find it set up that this article in the newspaper is in any sense a privileged communication, and it is unnecessary for the present purpose to inquire whether there is on the face of the article any evidence of express malice.

[85] The defendant Perryman being aggrieved filed an appeal. The appeal was heard by the full bench of the Court of Appeal on 9 and 10 April 1891.

Lord Coleridge CJ read the judgment of the Court of Appeal in which Lord Esher MR, and Lindley, Bowen and Lopes LJJ, concurred and this was what the Court of Appeal said (see p 284 of the report):

> The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, solong as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. Weentirely approve of, and desire to adopt as our own, the language of *Lord Esher* MR, in *Coulson v Coulson* 3 Times LR 846 — 'To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable.

[86] The decision in *Bonnard v Perryman* has been applied in the following two cases:

(1) *Khashoggi v IPC Magazines Ltd & Anor* [1986] 1 WLR 1412; and

(2) *Al-Fayed & Ors v The Observer Ltd* (LTR 14 July 1986).

[87] Lord Denning MR in *Harakas & Ors v Baltic Mercantile And Shipping Exchange Ltd & Anor* [1982] 1 WLR 958, at p 960 aptly sets out the law in this way:

> This case raises a matter of principle which must be observed. This court never grants an injunction in respect of libel when it is said by the defendant that the words are true and that he is going to justify them. So also when an occasion is protected by qualified privilege this court never grants an injunction to restrain a slander or libel — to prevent a person from exercising that privilege — unless it is shown that what the defendant proposes to say is known by him to be untrue so that it is clearly malicious. So long as he proposes to say what he honestly believes to be true, no injunction should be granted against him. That was made clear in *Quartz Hill Consolidated Gold Mining Co v Beall* (1882) 20 Ch D 501.

[88] I gratefully adopt the law as stated in Harakas by Lord Denning MR in adjudicating encl 4.

[89] I pause here for a moment.

[90] In adjudicating encl 4, I refrained from applying the principles in *American Cyanamid* (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504 (HL)) because the defence consisted of a plea of justification and/or qualified privilege. In support of this proposition, I would cite four authorities, namely:

(a) *Herbage v Pressdram Ltd & Ors* [1984] 1 WLR 1160, (CA);

(b) *Holley & Ors v Smyth* [1998] QB 726 (CA);

(c) *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4 (CA); and

(d) *Ron West Motors Ltd v Broadcasting Corp of New Zealand (No 2)* [1989] 3 NZLR 520 (HC)

[91] The ruling in *Herbage v Pressdram Ltd & Ors* is still good law. It has been applied with approval by the Supreme Court in *The New Straits Times Press (M) Bhd v Airasia Bhd* [1987] 1 MLJ 36 where Abdul Hamid Omar Ag LP delivering the judgment of the Supreme Court aptly said at p 38 of the report:

> Authorities do also show that the principle that there shall be no interim injunction if defence is raised 'applies not only to the defence of justification' (*Bonnard v Perryman* (1891) 2 Ch 269, 284), 'but also to the defence of privilege' (*Quartz Hill Consolidated Gold Mining v Beall* (1882) 20 Ch D 501), and 'fair comment' (*Fraser v Evans & Ors* [1969] 1 QB 349). 'In accordance with the long established practice in defamation action, the principles enunciated by the House of Lords in *American Cyanamid v Ethicon Ltd* [1975] AC 396 relating to interim injunctions are not applicable in action for defamation (*Herbage v Pressdram Ltd* [1984] 1 WLR 1160, 1162).

[92] If the plaintiff were to rely on the case of *Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tzu & Ors* [1977] 1 MLJ 56, a decision of the High Court, where the High Court granted an injunction restraining the defendants there from further writing, printing, or circulating caricatures contained in the issues of the newspaper owned by the defendant, with respect, the decision of the learned judge was purely per incuriam for the following reasons:

(a) the learned judge failed to take into consideration the decisions in *Bonnard v Perryman* and *William Coulson & Sons v James Coulson & Co* because these two decisions were not cited in the learned judge's decision; and

(b) the learned judge had held that *Quartz Hill Consolidated Gold Mining Company v Beall* was not the case in point and that the principles in *American Cyanamid* applied and in so doing the learned judge had erred in law.

[93] At any rate, the learned judge in *Datuk Syed Kechik* found that the argument based on justification was designed to delay the proceedings since no affidavit was filed in order to raise the defence. The learned judge too found that there was, in substance, either no plea of justification or an insufficient plea thereto.

[94] Be that as it may, the burden of establishing that the injunction ought to be granted was on the plaintiff. The plaintiff must demonstrate to this court that the defendants' plea of justification and qualified privilege are bound to fail. That would be the law and it is supported by a long line of authorities:

A (a) *Holley & Ors v Smyth* (CA), Auld LJ writing a separate judgment said at pp 745 to 746 of the report:

> No doubt that is why the courts appear to have accepted up to now that the *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 principles governing the grant of interlocutory relief do not apply to defamation cases where the *Bonnard v Perryman* rule is in play: see eg *per* Griffiths LJ in *Herbage v Pressdram Ltd* [1984] 1 WLR 1160, 1162G–H. Whatever the correct analysis of that approach, I can see no basis for regarding the potential damage to the plaintiffs here as of such an exceptional nature or gravity to take the case outside the general rule.
>
> Accordingly, I am of this view that Ian Kennedy J's reasons for the exercise of his discretion to grant relief were wrong and that the circumstances of this case do not justify the court in regarding it as an exception to the application of the general rule. If Mr Smyth's allegations are true, he is entitled to publish them, or to threaten to publish them, regardless of his motive or of the damage such publication would or may do to the plaintiffs. Unless it can be shown at this interlocutory stage that they are plainly untrue, the scheme of the law is that he should not normally be deprived in the meantime of an entitlement which he may subsequently establish. If he succeeds in doing so, his motive continues to be irrelevant, ifhe fails then the law will require him to compensate the plaintiffs and his motive may be punished by an award of aggravated damages (see *Rookes v Barnard* [1964] AC 1129, 1221, per Lord Devlin), a head of damages that the plaintiffs have included in their claim.

(b) *William Coulson & Sons v James Coulson & Co*.

(c) *Bonnard v Perryman*.

(d) *Al-Fayed & Ors v The Observer Ltd.*

(e) *Hubbard & Ors v Pitt & Ors* [1976] 1 QB 142, at p 148 where Forbes J said:

> It is well settled law that the court will not grant interim injunctions in defamation cases where justification is pleaded, unless perhaps the case of justification put forward is obviously a sham. This exception cannot really apply in a case where counsel is involved because it is counsel's duty to satisfy himself of the genuineness of any plea of justification before putting it forward. So here, no interim injunction to restrain further publication of the matters complained of will be granted.

(f) *The New Straits Times Press (M) Bhd v Airasia Bhd.*

(g) *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd*.

[95] *Gatley on Libel And Slander* (9th Ed) at p 636 carries the following statement germane to the occasion at hand:

That a plaintiff cannot obtain an interlocutory injunction to restrain the publication of defamatory words in the face of an affidavit from the defendant stating that he can and will justify the alleged libel can now be regarded as an invariable rule (The rule is not so rigid in overseas jurisdictions; it has been stated in Australia that the rule in *Bonnard v Perryman* does not apply: eg *National Mutual Life v GTV* [1989] VR 747; and in New Zealand the court will not, it seems, be satisfied with just an affidavit from the defendant deposing that he intends to justify; it will endeavour to make some assessment of the strength of the proposed defence eg *Ron West Motors v BCNZ* [1989] 3 NZLR 520. But if there appears to be an arguable case on justification, no injunction will be granted (see above cases and *NZ Mortgage Guarantee v Wellington Newspapers* [1989] 1 NZLR 4), unless it is plain that the plea of justification is bound to fail (There are no reported cases where an injunction has been granted despite an intended plea of justification, because the court decided the plea would fail. In the unreported case of *A, B, and C v Thames Television Ltd*, CA, 3 March 1987 an interlocutory injunction granted to restrain the broadcasting of material referring to the plaintiffs as war criminals was upheld even though the defendants had stated their intention of justifying whatever it was they were going to broadcast. But the defendants refused to disclose the contents of the intended broadcast and were not asserting the truth of any statement that the plaintiffs were guilty of war crimes, in contradistinction to the statement that they were reasonably suspected of being guilty. In *Williams v Wolman* CA, 30 January 1990 (unreported) Stocker LJ said that where there was an intended plea of justification 'the plaintiffs can only be entitled to an injunction, if the court is satisfied that a plea of justification must fail if put before a jury which was not perverse').

[96] At the end of the day, whether the defendants' plea of justification and qualified privilege are sustainable is entirely dependent on the trial. I have nothing to say and I must keep an open mind on this point. Indeed this court on an interlocutory application will not seek to resolve or make any provisional assessment of the rival contentions of falsity and truth advanced by the parties therein. Only time will tell. And the time will be at the trial proper.

[97] On the tort of malicious falsehood, the ruling in *Bonnard v Perryman* still holds good and an injunction will not be granted where the defendant states that he intends to justify. In *Animal Liberation (Vic) Inc & Anor v Gasser & Anor* [1991] 1 VR 51, the Supreme Court of Victoria, on appeal, set aside the interim injunction and held that the mere fact that a plaintiff pleads injurious falsehood, in addition to defamation, is not sufficient of itself to relieve the court from having to be satisfied that there is a very clear case for an injunction before restraining the repetition of defamatory words which the defendants propose to justify and which they have some real and not illusory prospect of justifying. In *Bestobell Paints Ltd v Bigg* [1975] FSR 421, Justice Oliver refused to grant an injunction and his Lordship held that in the interests of freedom of speech the courts will not restrain the publication of a defamatory statement, whether a trade libel or a personal one, where the defendant said that he was going to justify it at the trial of the action, except in cases where the statement was obviously untruthful and libellous.

[98] Lest I be accused of an oversight, I must now consider the submissions of the plaintiff. It was the stand of the plaintiff that the English approach can be seen in the case of *William Coulson & Sons v James Coulson & Co* in that the courts should only grant an interim injunction where:

(1) the statement is unarguably defamatory;

(2) there are no grounds for concluding that the statement may be true; and

(3) there is no other defence which might succeed.

[99] With respect, the manner in which criteria number (2) above has been phrased and framed is indeed misleading. If the plaintiff's paraphrasing of the decision of *William Coulson & Sons v James Coulson & Co* is correct then it means that the onus would fall on the defendants, at this stage, to show that the statements are indeed true. But, with respect, this is not the law. What Lord Esher MR had said at p 846 of the case of *William Coulson & Sons v James Coulson & Co* which had been reproduced somewhere in this judgment served as a useful guideline. The burden of proof must remain on the plaintiff to show that the statements are obviously untrue and that the defendants' plea of justification and qualified privilege are bound to fail.

[100] Next, it was submitted on behalf of the plaintiff that the application of the general rule in *Bonnard v Perryman* was somewhat relaxed in cases involving malicious falsehood. The plaintiff cited the case of *Kaye v Robertson & Anor* [1991] FSR 62, a decision of the Court of Appeal. But, with respect, this was not borne out from the reading of the case of *Kaye v Robertson & Anor*. In fact, the English Court of Appeal in *Kaye v Robertson & Anor* did not attempt to 'relax', so to speak, the application of the general rule in *Bonnard v Perryman*. Glidewell LJ had this to say in *Kaye*'s case (see p 68 of the report):

> The test in *Coulson v Coulson* applies to interlocutory injunctions in actions for malicious falsehood as it does in actions for defamation. However, in relation to this action, the test applies only to the requirement that the plaintiff must show that the words were false. In the present case I have no doubt that any jury which did not find that the clear implication from the words contained in the defendants' draft article were false would be making a totally unreasonable finding. Thus the test is satisfied in relation to this cause of action.

[101] In *Kaye*'s case, the impugned article was a newspaper report which claimed that the plaintiff had consented to an 'exclusive' interview and agreed to be photographed in his dire condition. On the facts, the English Court of Appeal held that the allegation of 'consent' was obviously untrue. The plaintiff in *Kaye* was able to and did prove that the statements about him were untrue. In *Kaye*'s case the test in *William Coulson & Sons v James Coulson & Co* which was also the test in *Bonnard v Perryman* was met. That the rule in *Bonnard v Perryman* applies with full and equal force in a case where the plaintiff's cause of action fastened on malicious falsehood is borne out by the following authorities:

(a) *Animal Liberation (Vic) Inc & Anor v Gasser & Anor*; A

(b) *Bestobell Paints Ltd v Bigg* ; and

(c) *Compaq Computer Corp & Anor v Dell Computer Corp Ltd & Anor* [1992] FSR 93.

[102] I have perused through the judgment of the Court of Appeal in *Kaye*'s case and I must say that no where in the said judgment was there a statement of law that the application of the general rule in *Bonnard v Perryman* was to be relaxed in cases where the plaintiff alleged the tort of malicious falsehood. B

[103] Next, the plaintiff argued along the following lines. That the rule in *Bonnard v Perryman* does not apply if the plaintiff pleads conspiracy to injure. The plaintiff relies on the case of *Gulf Oil (Great Britain) Ltd v Page & Ors* [1987] 1 Ch 327 (CA) to support his argument. What the plaintiff is saying was this. That, firstly, that his pleaded case is in fact a conspiracy to injure. Secondly, that the Gulf Oil is an accepted exception to the rule in *Bonnard v Perryman*. With respect, the plaintiff was wrong. He cannot be right. C D

[104] It must be borne in mind that, firstly, the plaintiff's plea of conspiracy is in fact a plea for conspiracy to defame. A plea of such a nature merges with the claim for libel. Secondly, the decision in *Gulf Oil* is subject to certain express caveats, namely: E

(1) there must be a clear evidence of a combination between the conspirators (see p 332 of the judgment of Parker LJ in *Gulf Oil*);

(2) in *Gulf Oil*, the injunction was granted on the grounds that there was a wrong done as the sole or dominant purpose of the publication by the defendant — by displaying an airborne sign in circumstances where it would be seen by the maximum number of people in order to inflict the maximum number of damage to the plaintiff by way of a revenge was an act specifically designed to injure the plaintiff there; F

(3) more recently, the Court of Appeal in *Femis-Bank (Anguilla) Ltd & Ors v Lazar & Ors, Singh (Dinesh Kumar) & Ors v Lazar & Anor* (1991) Ch 391 declined to grant an injunction along the lines suggested by *Gulf Oil*; G

(4) the Court of Appeal in *Femis-Bank (Anguilla) Ltd* cautioned that freedom of speech was an important factor to be taken into account and 'only in the very clearest cases such as existed in the Gulf Oil case would the interference with that public interest be justified by the grant of an injunction' (see the speech of Sir Nicolas Browne-Wilkinson VC in *Femis-Bank (Anguilla) Ltd*) and it is ideal to note that Sir Nicolas Browne-Wilkinson VC was the third member of the court that decided the *Gulf Oil* case; H I

(5) that the courts would be unlikely to allow the rule in *Bonnard v Perryman* to be avoided by the device of alleging conspiracy to injure; and

(6) that the courts will scrutinise any case where the cause of action in conspiracy is joined to a cause of action in defamation and the courts must be satisfied that such a joinder is not an attempt to circumvent the rule in *Bonnard v Perryman*.

[105] Next, in support of the plaintiff's 'conspiracy to injure' argument, the plaintiff also seeks to rely on the case of *Lonrho plc v Fayed & Ors* [1991] 3 All ER 303 (HL) as well as the case of *Lonrho plc & Ors v Fayed & Ors (No 5)* [1994] 1 All ER 188 (CA). By way of a rebuttal, the defendants pointed out that the two Lonrho cases cited above were not defamation cases. Whereas, here, the plea of conspiracy based on the plaintiff's own pleading relates to conspiracy to injure the plaintiff by means of libellous statements. And that would, according to the plaintiff, be a plea of conspiracy to defame.

[106] The defendants pointed out that the plaintiff's pleading on conspiracy was defective. It was emphasised that neither Dato' Pandithan nor Mr Sengutuvan have been named as co-defendants in this action. It was further emphasised that with the demise of the second defendant, the first defendant was left alone and it certainly cannot conspire with itself. I merely took note of these submissions. I remained neutral lest I be accused of being bias.

[107] The plaintiff harped on the offence under s 4 of the Printing Presses and Publications Act 1984 but the amended statement of claim was silent on this point. Incidentally, that section enacts as follows:

Printing press used for unlawful purpose:

4(1) Any person who prints or produces, or causes or permits to be printed or produced by his printing press or machine any publication or document:

(a) which is obscene or otherwise against public decency; or

(b) which contains an incitement to violence against persons or property, counsels disobedience to the law or to any lawful order or which is or is likely to lead to a breach of the peace or to promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity,

shall be guilty of an offence and shall on conviction be liable to imprisonment for a term not exceeding three years or to a fine not exceeding twenty thousand ringgit or to both.

(2) Notwithstanding any law to the contrary any printing press or machine which is used to print any publication or document which is the subject matter of an offence under sub-s (1) or any provision of any of the written laws specified in Schedule II shall be ordered to be forfeited by the court notwithstanding that no person is convicted of any offence.

[108] For the time being, I have nothing to say about s 4 of the Printing Presses and Publications Act 1984. I have more to say of this section at the trial of the main suit. Silence is the best anecdote at this point of time.

[109] I must put on record that the unreported judgment has since been reported in the Malayan Law Journal vide [2005] 5 MLJ 489.

[110] There were other inconsequential points that were raised but they do not merit any mention at all. I shall not allude to them here. Rightly, encl 4 should collapse like a deck of cards.

CONCLUSIONS

[111] The learned counsel on both sides came prepared. They raised interesting points of law that have been ventilated in this rather long judgment. I have patiently listened to them and reserved my decision to another day. To be precise on 15 July 2005.

[112] For the varied reasons adumbrated by me in this judgment, I made the following orders:

(a) the application by the plaintiff for recusal in encl 59 should be dismissed with costs and that the said costs should be paid by the plaintiff to the defendants forthwith; and

(b) the plaintiff's *inter partes* application for an interlocutory injunction against the defendants in encl 4 should be dismissed with costs.

[113] In order to expedite the trial of the main suit, I directed the plaintiff to file Form 63 in compliance with O 34 r 2(1) of the RHC. I too fixed the main suit for case management on 29 July 2005.

Applications dismissed.

Reported by Loo Lai Mee